IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1942.

No. .....

GREAT LAKES COCA-COLA BOTTLING COMPANY,
Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the Board of Tax Appeals denying to petitioner the right to a dividends paid credit under Section 27 (f) of the 1936 Revenue Law, in the sum of petitioner's adjusted net income for 1937, distributed by petitioner to its stockholders at the time of its complete liquidation in November, 1937, such distribution having been made to petitioner's stockholders in the stock of certain new corporations, (parties to a reorganization), in exchange for the stock in petitioner corporation, is found in (R, 17-20), and reported in B. T. A. Reports, p. 1348.

The opinion of the Circuit Court of Appeals of the Seventh Circuit, affirming the decision of the Board of Tax Appeals upon the question herein presented, but for a different reason, is not yet reported, but is set out in (R, 39-43).

The sole question raised in this petition for certiorari is whether petitioner is entitled to a dividends paid credit in 1937 under the provisions of Section 27 (f) of the 1936 Revenue Act.

ASSIGNMENTS OF ERROR.

Petitioner assigns as error the following acts or omissions by the Board of Tax Appeals and by the United States Circuit Court of Appeals of the Seventh Circuit:

The Board and the Circuit Court having found that on November 30, 1937, petitioner, in pursuance of a plan of reorganization, transferred all of its assets, including its earnings, for the period from January 1, 1937, to November 30, 1937, to various Michigan, Ohio, and Nevada corporations, in exchange for the stock of the latter, which stock was then distributed by petitioner in complete liquidation to its stockholders in exchange for the stock of petitioner, such transactions being non-taxable under Section 112 (b), (4) and (3) of the Revenue Act of 1936,—

The Board erred in holding that because of Section 115 (h) of the 1936 Act, petitioner's distribution of stock did

not constitute a distribution of earnings or profits of any corporation, and that subsection (f), Section 27, must be construed in the light of Section 115 (h), and that since the distribution of stock by petitioner in liquidation wasn't a distribution of earnings under Section 115 (h), no part of the distribution of stock was properly chargeable to the earnings or profits, and that petitioner was therefore not entitled to any dividends paid credit under subsection (f) of Section 27.

The Court of Appeals for the Seventh Circuit erred in holding that the distribution in liquidation made by petitioner was not the distribution contemplated by Section 27 (f). That was undertaking the construction or interpretation of a provision of the law upon which your comment in *Commissioner vs. Credit Alliance Co.*, 316 U. S. 107, is as follows: "Whatever may be said of the policy behind the statute's provisions, we are not at liberty to disregard the direct and unambiguous language of subsection (f)",— And the Court below further erred in not passing upon the Commissioner's contention that Section 115 (h) limits the effect of Section 27 (f) and in not holding as it did hold in its *Winchester Repeating Arms* decision, (C. C. H., Federal Tax Service, 1943, Volume 4, page 9486), that it found in your decision in the *Credit Alliance* case no basis for the Commissioner's assumption that had the *Credit Alliance* case involved the application of Section 115 (h), as amended by the 1938 Act, your decision there would have been otherwise; and that it, the Seventh Circuit, did not feel at liberty to disregard the direct and unambiguous language of Section 27 (f).

The Board and the Seventh Circuit further erred in the finding of a deficiency for the year 1937, instead of determining that there was no additional undistributed profits tax due by petitioner for that year; and the Board and the Seventh Circuit further erred in not finding that petitioner is entitled to a redetermination of the alleged deficiency, and to a refund of the undistributed profits tax paid by petitioner in error at the time of filing its 1937 return.

ARGUMENT.

At this point we would like to direct the Court's attention to the fact that there has never been the slightest suggestion by anyone that petitioner in its liquidation and reorganization proceedings was in any way seeking to avoid a surtax on undistributed profits; and that it wasn't so seeking is most clearly shown by the fact that in making its income tax return for 1937, petitioner not only didn't even claim a dividends paid credit in the sum of its 1937 earnings, but actually sought to be allowed a dividends paid credit carry over for 1936, to which credit it believed itself at least equitably entitled. In so proceeding, petitioner actually paid an undistributed profits tax of $6,923.40, when in truth it owed no undistributed profits tax whatever.

In the many cases involving the 1936 undistributed profits tax law, the Commissioner or Collectors of Internal Revenue put forward numerous defenses, and make

various contentions in attempted support of their claimed deficiencies. In what we believe to have been the first, or one of the first of these cases; namely, *Centennial Oil Co. vs. Thomas,* a Fifth Circuit decision, 109 Fed., (2d), 359, the Court sustained the Government's contention that 27 (h) denies the benefit of 27 (f) to the taxpayer if the money or property transferred is not taxable to the distributee. There is, however, in that case, a very strong dissenting opinion by Judge Hutcheson.

This same contention, however, has been overruled by the Circuit Court of Appeals of the Second Circuit in *Commissioner vs. Kay Mfg. Corp.,* 122 Fed. (2d), 443, and by the Board of Tax Appeals, and by the Fourth Circuit, and by this Court in *Helvering vs. Credit Alliance Corp.,* 42 B. T. A., 1020; 122 Fed. (2d), 361; and 316 U. S. 107.

Treasury Regulations 94, Article 27 (f), declaring that one making a liquidating distribution of earnings accumulated since February 28, 1913, must be denied the dividends credit in respect of such distribution, unless the amount distributed is taxable in the same year to the distributee, and providing that if the distributee in that year makes a distribution which entitles it to a dividends paid credit, it may allocate a proper proportion thereof to the distributor of the liquidating dividend, has been held by this Court in *Commissioner vs. Credit Alliance, supra,* to be not only contradictory of the plain terms of the subsection, but an attempt to add a supplementary legislative provision which could only be enacted by Congress, and that the Court below was right in refusing to give effect to the regulation.

The Court of Appeals of the Seventh Circuit, in *Commissioner vs. Winchester Repeating Arms Company, supra,* disagrees with the Commissioner in his deductions drawn from your decision in the *Credit Alliance* case, as to the control of 27 (f) by 115 (h);—but in order to stress the fact that it is not possible that Congress could have intended by Section 115 (h) to modify or control or destroy the effect of Section 27 (f), we are going to quote briefly from the decision of the Seventh Circuit in the *Winchester Repeating Arms* case as follows:

> "The whole scheme for imposing a surtax on undistributed profits of corporations appeared first in the Act of 1936, Sections 26 and 27 of which provided for credits against the tax imposed by Section 14. Section 115, relating to distributions by corporations, is older, parts of it going back to 1916, and subsection (h) of which was new in the Act of 1934. This subsection was amended in 1936, but we are informed by the Committee Report No. 2457, Seventy-fourth Congress, that 'While making no change in the rule as applied under existing law, the recommended amendment is desirable in the interest of greater clarity.' In other words, the amendment in 1936 of a subsection enacted in 1934 was not intended to change the rule. Thus it will be seen that Section 115 (h), enacted in 1934 and amended in 1936, must have had a purpose entirely distinct from the subsequently enacted Section 27. We are not informed by the Committee Reports on the 1938 Revenue Act as to the reason for the amendment of Section 115 (h) to cover distribution of property or money in addition to that of stock or securities, as provided by Section 115 (h) of the 1936 Act. However, it does seem clear to us that if Congress intended to change the scope of Section 27 (f), it would have done so directly by amendment of

that Section instead of remotely by amendment of Section 115 (h)."

There seems to have been little left, therefore, for which the Commissioner might contend, and he is at last forced to pin his hopes to the argument that 27 (f) does not mean what it seems to mean; that when Congress speaks of amounts distributed in liquidation, it does so with a mental reservation as to the use of the word liquidation, and that it refers only to liquidations under the provisions of 112 (b) (6); i. e., the liquidation of a subsidiary corporation, and that the kind of liquidation petitioner went through is not the kind of liquidation that Congress had in mind.

May we here suggest that there is nothing whatever in the simple language of Section 27 (f) which would indicate that Congress had in mind any such restrictions in the meaning of the word "Liquidation"; and had Congress had any such intent, it would have been a very simple matter to have said so.

It is of course true that Congress, by amendment (b) (6) to Section 112, made distributions to parent corporations non-taxable in order to encourage the simplification of corporate structures, but the "No gain or loss" provision of Section 112 refers to no gain or loss for income tax purposes, and such exemption of gain or loss was ample encouragement to the liquidation of subsidiary corporations, and there is no reference whatever in Section 112 to the elimination of undistributed profits taxes.

It may be that Congress in enacting 27 (f) had partly in mind the furnishing of an additional incentive to the

simplification of capital structures, but we submit that even if this be so, Congress could not have intended to confine the benefits of Section 27 (f) to liquidations under 112 (b) (6).

If, however, the Commissioner in the instant case does not actually contend that the distribution in liquidation referred to in Section 27 (f) refers solely to the liquidation of subsidiaries under 112 (b) (6), then he must concede that a distribution in liquidation of any solvent corporation to its stockholders must, as to such part of the distribution properly chargeable to the earnings or profits accumulated after February 28, 1913, and for the purposes of computing the dividends paid credit, be treated as a taxable dividend paid, and the granting of such a benefit to any ordinary solvent corporation could not be in any way considered as encouraging the simplification of corporate structures, and we respectfully suggest that there is no more reason for so extending the benefits to the ordinary solvent corporation that goes into liquidation, than for extending such benefits to a corporation such as petitioner, whose liquidation occurred in connection with a reorganization.

The Commissioner, by way of brief in the Court below, naively says that; "In the *Credit Alliance* and *Kay Manufacturing* cases it was difficult to argue that a transfer of all the taxpayer's assets (including its earnings) to its stockholders, in liquidation of the taxpayer, was not a distribution of the taxpayer's earnings." And the Commissioner further says that, "The taxpayer was not perpetuated, but eliminated. The taxpayer's stockholders, as

recipients of the liquidating distribution, were the taxpayer's only successors. But here, as in the *Sansome* case, the taxpayer's assets (including its earnings) have been transferred to successor corporations, not to its stockholders"; and that, "The stockholders have not in any realistic sense received liquidating distributions at all."

Such being the Commissioner's theory, we would like to ask him, what possible difference is there in the end result of each of these two forms of liquidation, taxwise or otherwise. In the *Credit Alliance and Kay Manufacturing* cases, the owners of the stock of the parent company, by virtue of such ownership, owned the stock of the subsidiary company, and by virtue of such ownership owned the assets of the subsidiary company; and when the subsidiary company transferred all of its assets in liquidation to the parent company, the stockholders of the latter still owned all of the assets of the subsidiary.

We submit in the instant case petitioner's stockholders owned all of its assets prior to the liquidation, and continued to own all of its assets subsequent to the liquidation, and the end result as to the relationship of stockholders to assets is identical in both instances.

The Commissioner, of course, views with distaste the idea that petitioner is, by virtue of Section 27 (f), relieved of the necessity of paying undistributed profits taxes, but we submit there is no more reason for holding petitioner liable than there is for holding *Credit Alliance and Kay Manufacturing* liable; and certainly, and in any event, there was as much reason for Congress to extend the relief

from undistributed profits taxes to the liquidation of petitioner as there was to extend such relief to the liquidation of any ordinary corporation which transfers all of its assets to its individual stockholders.

Lastly, the Commissioner says that in the *Credit Alliance* and *Kay* cases, the liquidation was of a subsidiary corporation, which being tax free under 112 (b) (6), necessarily resulted in a simplification of the corporate structure, and the Congressional purpose was to encourage such simplification, while in the present instance there is a multiplication of corporations, and that with reference to 112 (b) (3), (b) (4), and (b) (5), reorganizations in general, there may be said to be no usually resulting corporate simplification.

And here, we would merely suggest that we all know the kind of corporate structure that Congress is supposed to have sought to have simplified, and such is not the corporate structure that resulted from petitioner's liquidation and reorganization. There can be no suggestion here that petitioner sought to accomplish any pernicious top-heavy organization.

When all is said and done, there is but one issue in this case, and that is, whether petitioner, having distributed its assets in liquidation, is entitled under the direct and unambiguous language of 27 (f), to a dividends paid credit in the sum of its adjusted net income for the year 1937; and again we say that there is no difference in the end result between the *Kay Manufacturing Co.*, and the *Credit Alliance* cases, and the instant case.

And there seems to us no justification for seeking a construction and application of Section 27 (f) to petitioner, different from the construction and application of that Section in the *Credit Alliance* and *Kay Manufacturing* cases.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, that the Petition for Writ of Certiorari should be granted, and upon final hearing, the decree of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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